STATE OF MICHIGAN

COURT OF APPEALS

JEROME MOORE, Plaintiff-Appellant,	UNPUBLISHED February 4, 2014
v	No. 310920 Wayne Circuit Court
SOUTHEASTERN MICHIGAN HEALTH ASSOCIATION and CITY OF DETROIT DEPARTMENT OF HEALTH AND WELLNESS PROTECTION, Defendants-Appellees.	LC No. 10-006409-CD

Before: FORT HOOD, P.J., and SAAD and BORRELLO, JJ.

PER CURIAM.

Plaintiff appeals the trial court's order of summary disposition under MCR 2.116(C)(10). For the reasons stated below, we affirm.

I. FACTS AND PROCEDURAL HISTORY

A. FACTS

In this alleged employment discrimination, wrongful termination lawsuit under the Elliott-Larsen Civil Rights Act ("the CRA"), MCL 37.2701, *et seq*, plaintiff Moore claims disparate treatment based on age and race under MCL 37.2202 against defendants Southeastern Michigan Health Association ("SEMHA") and the city of Detroit. He also asserts that he was fired for engaging in a "protected activity" under the CRA, and claims retaliation under MCL 37.2701. SEMHA's organizational structure and relationship with the city of Detroit is complicated, and merits some explanation.

SEMHA is a non-profit public-health organization that serves independent and government health departments in seven Michigan counties and the city of Detroit. It acts as an outside employment consultant, managing grants that its clients receive from the state and federal governments, and private foundations. SEMHA uses these funds to hire professionals,

who are matched with member health departments. The professionals then execute particular programs supported by the grants, under the oversight of the member health departments.[1]

SEMHA's employment practices are predicated on the needs of their member organizations. Typically, the member organization, such as the city of Detroit—not SEMHA—identifies the need for a grant-funded worker, interviews candidates, and recommends SEMHA hire a specific individual. SEMHA then does so, and its employee works with the local bureaucracy of the requesting health department. In the view of SEMHA and the city, SEMHA employees remain SEMHA employees, not city employees. The city does not pay their salary, which comes from the grant managed by SEMHA. Workers hired in this fashion work in the same offices as city of Detroit health-department employees, and are managed on site by city personnel. SEMHA Executive Director Thomas Cieszynski, who is Caucasian, is the only individual at SEMHA allowed to "technically" hire and fire employees. Both SEMHA's lead human-resources officer (Personnel Director Valaria Overton) and the city's human-resources professional assigned to investigate OEPHP during the dates of plaintiff's employment (Bridget Lamar) are African-American women.

Moore, a middle-aged African-American man, started work for SEMHA on February 28, 2008 and was terminated on March 10, 2009.[2] OEPHP General Manager Bruce King, and two lower-level supervisory employees at the office, Michael Gregory and Jonathan Shaw, interviewed Moore for placement in a grant-funded position at OEPHP.[3] All three agreed Moore should be hired for the job, and made such a recommendation to SEMHA. Accordingly, SEMHA assigned Moore to work at OEPHP. Moore's tasks involved assisting the city government in preparation for city-wide health emergencies.

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[1] Defendant city of Detroit Health and Wellness Program is one such member department of SEMHA. The subsection of the department at issue in this case, the Office of Emergency and Public Health Preparedness Program ("OEPHP"), housed grant-funded SEMHA employees at the time of the events relevant to this lawsuit.

[2] Though Moore works for SEMHA—not the city of Detroit—SEMHA's relationship with the City allowed him to name the City as a defendant. The CRA, though it does not limit discrimination claims to an employer's employees, does require "some form of nexus or connection between the employer and the status of the nonemployee." *McClements v Ford Motor Co*, 473 Mich 373, 386; 702 NW2d 166 (2005). As such, "an employer can be held liable under the CRA for discriminatory acts against a nonemployee if the nonemployee can demonstrate that the employer affected or controlled a term, condition, or privilege of the nonemployee's employment." *Id*. at 386–387. So, if the City actually "affected or controlled a term, condition, or privilege" of Moore's employment, it is possible that the CRA permits him to sue the City.

We do not analyze this issue further, as it is not before our Court. The trial court held that Moore could sue the City, and defendants do not appeal this portion of the holding.

[3] King and Gregory worked for the city of Detroit. Shaw, like Moore, was employed by SEMHA and assigned to OEPHP. King, Gregory, and Shaw are Caucasian.

Moore performed poorly during his first few months at OEPHP. He consistently failed to meet deadlines and submitted low-quality work product. Due to his poor performance, Moore's immediate supervisors, Shaw and Gregory, recommended to SEMHA that Moore be released from OEPHP.[4] However, before discussing the matter with SEMHA Personnel Director Overton, Shaw and Gregory decided to give plaintiff another chance, and thus withdrew their recommendation, and decided to further train Moore and modify his job duties. Moore's new focus was operational planning, which involved creating emergency-response plans for major sporting and commercial events in Detroit. He indicated his approval for the job reclassification, and the move was a lateral one and involved no difference in pay or status.

The modification of his job responsibilities did little to improve Moore's performance. His work remained of poor quality and he seemed unable to work autonomously. Shaw prepared a routine performance review reflecting these concerns in July 2008, and he and Gregory subsequently, once again, recommended that SEMHA remove Moore from OEPHP. Personnel Director Overton reviewed the request, and asked for written documentation to support Gregory and Shaw's recommendation.

In the meantime, the grant funds for Moore's position expired, which caused his termination from SEMHA and, in turn, OEPHP. SEMHA Personnel Director Overton verified the exhaustion of the grant support, and approved the release in July 2008. Moore responded to his dismissal with two letters, both sent to Overton in that same month. In those communications, Moore admitted his shortcomings as an emergency planner and never made any claims of employment discrimination. But rather than take personal responsibility for his own poor performance, he blamed his failures on the OEPHP management. Specifically, he stated that emergency planners were not properly compensated for meeting attendance and were made to work through lunch. He contested the attendance records on his performance review, stating that he had regularly attended work. Moore also suggested, illogically, that SEMHA fired him because he overheard an argument between Shaw and Gregory, which was also overheard by Moore's Caucasian co-workers.[5] And, he mentioned an incident where Gregory

[4] As a SEMHA employee, Moore's release from OEPHP needed to be approved by SEMHA personnel director Overton.

[5] The argument was not related to Moore or his employment. The subject of the disagreement was Jennifer Floyd, an African-American, female employee, who Gregory apparently believed should be disciplined for her conduct at work. Though the argument took place in Shaw's closed office, several employees heard Gregory use the word "bitch," possibly referring to Floyd, or Personnel Director Overton.

Both SEMHA and the city of Detroit investigated the incident, as it involved employees (Shaw and Gregory) from each organization. As noted, both investigators (SEMHA Personnel Director Overton and city of Detroit Human Resources Consultant Bridget Lamar) are African-American women. As a result of the SEMHA investigation, conflict-resolution and diversity training were provided to OEPHP in September 2008. The city of Detroit investigation concluded that this training was sufficient to address the complaints related to the argument. The city of Detroit

allegedly told him the only way OEPHP could afford to send Moore to an overnight conference in Lansing was if he "bunk[ed] together" with coworker Jennifer Floyd. The letters contained no reference to age, race, or sex discrimination.

SEMHA Personnel Director Overton immediately began an investigation of Moore's claims. Her findings included: (1) SEMHA's meeting compensation policies were violated as to all employees (not just Moore); and (2) Moore's performance review misstated his attendance record. Accordingly, Overton corrected Moore's performance review, and suspended Shaw for his violation of SEMHA's compensation policies. Overton also revoked Shaw's managerial duties.

Overton did not, however, make any findings to absolve plaintiff of his poor performance, nor did she reinstate Moore. His termination proceeded, because of: (1) lack of funding; and (2) poor work performance. SEMHA Executive Director Cieszynski wrote a letter explaining as much to Moore on August 1, 2008.

Later that month, however, OEPHP received a new grant, with which it could fund a position comparable to Moore's. Once again, after voluntarily reviewing Moore's file, OEPHP General Manager King decided to give Moore yet another chance to succeed in his job, and recommended to SEMHA that he be rehired. SEMHA agreed and gave Moore back pay for his month of unemployment. Moore returned to work on August 28, 2008.[6]

King, who clearly had some hope that Moore would improve his performance, served as Moore's new supervisor.[7] Sadly, Moore's poor performance continued. His two major projects were late and incomplete. As a result, King once again asked SEMHA to remove Moore from OEPHP. He submitted documentation of Moore's subpar work product, along with evidence of

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investigation, which addressed other incidents of alleged misconduct at OEPHP, was more extensive and is addressed in the following footnote.

[6] In October 2008, shortly after Moore returned to work, SEMHA Executive Director Cieszynski wrote a memorandum to Dr. Phyllis Meadows, the director of the City's Health and Wellness Program. The memo detailed complaints from SEMHA employees made about city of Detroit employees at OEPHP, and included some of the allegations Moore referenced in his letters to Overton, and complaints from Overton herself. It also included a complaint from a Caucasian employee, Donna McLean-Orr.

Moore mischaracterizes this memo, implying that it is a list of findings. It is not. Instead, the memo listed allegations to provide notice to Dr. Meadows, the City authority in a position to order an investigation of the claims. Dr. Meadows subsequently ordered such an investigation, carried out by Human Resources Consultant Lamar. As mentioned, Lamar concluded that the diversity training provided to OEPHP staff in September 2008 was sufficient to address the complaints detailed in Cieszynski's memorandum.

[7] Moore's previous supervisor, Michael Gregory (one of the employees Moore complained about in his July 2008 letters to Overton) had been suspended (and was subsequently discharged), for work performance issues unrelated to Moore.

his efforts to assist Moore. Both Executive Director Cieszynski and Personnel Director Overton reviewed this information. Based on these reviews, Cieszynski fired Moore on March 10, 2009.

B. PROCEDURAL HISTORY AND ALLEGATIONS ON APPEAL

Moore filed suit against SEMHA and the city in June 2010. He alleged race, age, and sex discrimination under the CRA. He also asserted claims of retaliation and hostile work environment under that same statute. After a lengthy discovery and deposition process, SEMHA filed a motion for summary disposition as to all claims in March 2012. The city filed a similar motion the next month.

At the May 11, 2012 motion hearing, the trial court held that:

> (1) there were questions of fact as to the city of Detroit's control over Moore's employment, and accordingly the claim against the city could not be dismissed on that basis;
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> (2) Moore failed to provide direct or indirect evidence of disparate treatment because of his race and sex, as he was hired as a "black man, at a certain age," and failed to show that similarly situated, non African-American employees (i.e., non African-American employees with poor work performance) received different treatment than him;
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> (3) Moore failed to provide evidence of age discrimination, as the comments he cited were "stray remarks," and thus not evidence that plaintiff was treated differently than younger employees for the same or similar conduct;
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> (4) SEMHA showed a legitimate, non-discriminatory reason to dismiss Moore in his poor work performance;
>
> (5) Moore's retaliation claim failed because the incident over which he claimed retaliation—work-place violence—is not protected under the CRA, nor did his July 2008 letters make reference to age, race, or sex discrimination. Further, the length of time between the supposed retaliation incident and his termination (5 months) meant that no reasonable juror could conclude he was terminated because of his participation in an investigation.

The trial court thus granted summary disposition under MCR 2.116(C)(10) to defendants as to all Moore's claims, save the allegation of a sexually-hostile work environment, which it took under advisement. It subsequently granted summary disposition to defendants under MCR 2.116(C)(10) as to this charge as well in a written opinion and order. That order stated there was no evidence Moore was harassed because of his sex. The trial court then entered an order dismissing Moore's complaint in its entirety with prejudice.

Moore appeals the trial court order, but has dropped some of his earlier allegations. The remaining disparate treatment claims are for age and/or race discrimination. Specifically, he claims that he established under MCL 37.2202(1)(a): (1) direct evidence of age discrimination; and (2) a prima facie case of age or race discrimination. He also appeals the retaliation claim for

the work-place violence incident, and expands that claim to encompass new allegations for which he did not claim retaliation in his suit before the trial court.

Before our analysis of plaintiff's specific claims of discrimination, all of which completely lack merit, we make the following preliminary observations:

> (1) Plaintiff's counsel's brief contains numerous distortions and misrepresentations of the record evidence, which made our analysis all the more burdensome.
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> (2) Moore's allegations of age discrimination relate to two individuals, OEPHP General Manager King, and SEMHA employee Shaw. Yet, plaintiff provided no evidence that his termination had anything to do with age and the record shows there is overwhelming evidence of his repeated and continued poor job performance.
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> (3) Moore makes numerous allegations of disparate treatment due to race, yet provides absolutely no evidence that he was treated any differently than any other non-minority due to race.

II. STANDARD OF REVIEW

A grant of a motion for summary disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In reviewing such a decision under MCR 2.116(C)(10), Michigan appellate courts consider the affidavits, pleadings, deposition, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id*. at 120. MCR 2.116(C)(10) motions for summary disposition are properly granted where no genuine issue of material fact exists. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). In other words, such motions are properly granted when, based on the undisputed material facts, plaintiff is not able to prove his claim. See *Koenig v City of South Haven*, 460 Mich 667, 675; 597 NW2d 99 (1999). The party opposing summary disposition cannot rest its case on mere allegations or denials in its pleadings, or promise to offer factual support at trial. MCR 2.116(G)(4); *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 374; 775 NW2d 618 (2009), citing *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). It must come forward with admissible evidence to establish the existence of a genuine issue of material fact. *Quinto*, 451 Mich at 362. Conjecture and speculation are not sufficient to meet a non-moving party's burden of establishing a genuine issue of material fact. *Karbel v Comerica Bank*, 247 Mich App 90, 97–98; 635 NW2d 69 (2001) (citations omitted).

III. ANALYSIS

As noted, the trial court correctly dismissed plaintiff's claims for the reasons it stated at the May 2012 motion hearing, reasons we adopt here.

There is no direct evidence of discrimination.[8] To the contrary, as the trial court observed, both SEMHA and the city of Detroit went to some lengths to accommodate plaintiff, despite the fact that he simply did not perform his job well. Likewise, Moore has failed to show indirect evidence of discrimination—indeed, he has not shown any evidence whatsoever that he was treated differently than any other employee, much less because of age or race. The city of Detroit personnel who recommended his hire knew of his age and race when they requested plaintiff for his initial employment opportunity, as did SEMHA Executive Director Cieszynski, who hired plaintiff. Those same city personnel observed and noted plaintiff's deficient performance almost immediately, but nonetheless tried to help plaintiff succeed. Indeed, despite his continued poor performance, plaintiff was given many chances to succeed by the very people he claims discriminated against him. But ultimately, Moore simply either could not or would not perform his job duties, leading to his termination. It was only after his final dismissal that Moore raised allegations of age and race discrimination. Further, many of the incidents of which Moore complains were investigated by human resources professionals for SEMHA and the city, both of whom are minorities, and neither investigation revealed any age or race discrimination against him. While there were a number of problems at the workplace, the investigations showed they were not race or age based, but rather grounded in poor management, which ultimately affected all employees.

Finally, plaintiff's claim of retaliation fails as a matter of law. As noted by the trial court, this claim stems from an alleged workplace violence incident (harsh verbal repartee) that neither has anything to do with plaintiff, nor provides a legal basis for a retaliation claim under CRA. Therefore, the trial court properly awarded summary disposition to defendants under MCR 2.116(C)(10) as to plaintiff's claims of : (1) age discrimination; (2) race discrimination; and (3) retaliation under the CRA.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Henry William Saad
/s/ Stephen L. Borrello

[8] At best, comments plaintiff regards as ageist, but which have no connection to the decision to discharge him, are "stray remarks," which do not qualify as direct evidence of discrimination. See *Sniecinski v BCBSM*, 469 Mich 124, 136–137; 666 NW2d 186 (2003); *Krohn v Sedgwick James of Mich, Inc*, 244 Mich App 289, 292; 624 NW2d 212 (2001).